UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation, owner and claimant of the Steamship VIRGINIAN,
Appellant and Cross-Appellee,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a corporation,
Appellee and Cross-Appellant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation, owner and claimant of the Steamship VIRGINIAN,
Appellant and Cross-Appellee,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a corporation, as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,
Appellee and Cross-Appellee,

STRATHALBYN STEAMSHIP COMPANY, LTD., a corporation,
Appellee and Cross-Appellant.

In Admiralty

No. 2723.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Reply Brief of Appellee and Cross-Appellant

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Appellee and Cross-Appellant.

In Admiralty

No. 2728.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Reply Brief of Appellee and Cross-Appellant

Appellant's argument commences with an effort to determine the position of the Flyer, Strathalbyn and Virginian with reference to each other at the time the passing whistles were given. As a prelim-

inary to our answer to the argument upon that point and the argument in support of other phases of the case, we call attention to the fact that McLeod and Duffy (of the Virginian) testify they heard but two whistles from the Strathalbyn to the Virginian. The court found that the Strathalbyn blew three passing whistles to the Virginian. Some of the Virginian's criticism of the Strathalbyn's navigation will lose its weight if the Virginian did not hear or has forgotten the Strathalbyn's first whistle to the Virginian, and some of the inconsistencies in the assertions made in the Virginian's brief may be excused if the Virginian did not hear the Strathalbyn's first whistle to her, which, according to the Strathalbyn's testimony, was blown to the Virginian when she was a mile or more away.

In the course of the argument concerning the relative positions of the vessels, which argument is made from pages 20 to 32 in the brief, appellant seems to reach so many different conclusions that we are compelled to attribute this uncertainty to an attempt to reconcile conflicting, impossible and irreconcilable evidence, and to an entire disregard of evidence which shows the position of the Strathalbyn with relation to the Flyer when the Strathalbyn first whistled to the Virginian, and to an entire disregard of the probability that the Flyer passed the Virginian to the north of Pully Point, and to an

entire disregard of the place of the collision, and to a desire to make the distance as short as possible.

Appellant's calculations assume the Virginian was overtaken and passed by the Flyer abreast of Pully Point, and makes no allowance for the probability that the Flyer passed the Virginian north of Pully Point, although, on page 20 of appellant's brief, the following appears:

> "The testimony shows the Flyer passed the Virginian *off of or slightly north of* Pully Point."

For appellant to reach the conclusions it arrives at in its brief (pages 20 and 26), it has to assume that the Flyer was abeam of the Strathalbyn when the Strathalbyn blew the first time to the Virginian. Appellant (brief, 20) says it is *admitted* that "as the Flyer and Strathalbyn were passing *abeam*, the Strathalbyn blew her first whistle to the Virginian." Duty compels us to say this statement is without any foundation in fact. As a matter of fact the Strathalbyn was considerably ahead of the Flyer when she blew the first time to the Virginian (Beecher says shortly after blew to Virginian, Flyer abeam—Ap. 206; Milnor says Strathalbyn half a mile on Flyer's port bow—Ap. 192-193; Beaumont says Strathalbyn one quarter mile ahead of Flyer—Ap. 731. The same inference must be drawn from Hoffstetter—Ap. 606, when taken in connection with Ap. 593 and 594, and

from McIntyre—Ap. 125, for McIntyre came out on the Flyer's deck after the Flyer had blown to the Strathalbyn and he did not hear the Strathalbyn initiate the whistles with the Flyer).

Notwithstanding the above testimony, there occurs, on page 24 of appellant's brief, the following:

> "That the Strathalbyn blew her first passing whistle to the Virginian when the Flyer was abeam or just abaft the beam of the Strathalbyn,"

and substantially the same on page 42. This is a sample of an assertion by appellant that occurs time after time in the brief, and we consider it of sufficient importance to specially call the court's attention to the fact that it is, in our opinion, a reckless and unfounded assertion.

As Beecher had ported the Strathalbyn's helm and swung, the Flyer would appear to Beecher to be more nearly abeam of the Strathalbyn than if she had not ported. The Flyer's eyewitnesses were, therefore, the best judges of the Strathalbyn's position with respect to the Flyer, and they all, directly or inferentially, say the Strathalbyn was ahead of the Flyer a considerable distance when she first blew to the Virginian.

That the Strathalbyn could not have been abeam of the Flyer is almost a demonstrated fact, irrespective of the eyewitness testimony, if we consider

Mr. Duffy's evidence. Duffy testifies that one minute after he heard the first whistle from the Strathalbyn to the Flyer, he heard a whistle from the Strathalbyn to the Virginian (appellant's brief, 23). If the Flyer was 300 feet ahead of the Strathalbyn when the Strathalbyn whistled to the Flyer and the period of time between the Strathalbyn's whistle to the Flyer and the Strathalbyn's whistle to the Virginian was one minute, the Flyer would be 654 feet ahead of the Virginian when the Strathalbyn was abeam of the Flyer. Under such circumstances, there would only be 654 feet between the Strathalbyn and the Virginian at the time the Strathalbyn first whistled to the Virginian. If appellant is right in assuming that the Strathalbyn was abeam of the Flyer when the Strathalbyn first whistled to the Virginian, the Virginian would have collided with the Strathalbyn in 654-1724ths of a minute after the Strathalbyn first whistled to the Virginian (654 being the distance between the Virginian and Flyer-Strathalbyn, and 1724 being the combined speed of the Strathalbyn and Virginian).

Capt. Green, of the Virginian, heard no passing whistles from the Strathalbyn to the Virginian after he reached the Virginian's bridge. As Green heard no passing whistles from the Strathalbyn to the Virginian, the Strathalbyn must have blown three passing whistles before Green got on the bridge, if Green heard what was blown. According

to the Virginian's testimony, Green came on the bridge immediately after the Strathalbyn had blown its first whistle to the Virginian (two passing whistles must have been blown from the Strathalbyn after Green left his cabin and started for the bridge); the Virginian's engines were stopped and reversed; at least one passing whistle was blown by the Strathalbyn and heard by Duffy; the Strathalbyn blew four danger whistles; the Virginian blew three danger whistles; all of the above (in accordance with the testimony of the Virginian) occurred within this space of 654-1724ths of a minute, if Duffy is telling the truth. This absurdity does not develop if the eyewitnesses from the Flyer are believed and their testimony enters into the calculations.

In furtherance of the purpose of appellant above indicated, it also assumes that the Flyer was less than a fifth of a mile ahead of the Virginian when the Strathalbyn passed the Flyer (Page 26 appellant's brief). This is directly contrary to the testimony of Capt. Burns quoted on page 26 of appellant's brief as follows:

> "The Flyer was probably a quarter of a mile or *more* from the Virginian when we passed the Strathalbyn."

and the statement that the Flyer was less than a fifth of a mile ahead of the Virginian when the

Strathalbyn passed the Flyer is directly contrary to every eyewitness who testifies on the subject.

Appellant has insisted throughout its brief that facts are demonstrated by the evidence, when, in our humble judgment, there is no merit in the assertion. By such processes, it may be hoped to gain some advantage.

The inconsistencies to which we have above referred and are about to point out are developed by the appellant in an attempt to position the Strathalbyn and Virginian prior to the collision to its satisfaction and regardless of the evidence. The purpose of this attempt is to minimize the distance between the Strathalbyn and Virginian when the whistles commenced, in order to demonstrate that the vessels were so close together when the Strathalbyn first blew to the Virginian that the collision was imminent and the Virginian *in extremis*, and that the Strathalbyn's only whistle should have been the danger whistle and her only engine movement a stop and reverse after her first whistle to the Virginian or surely not later than her second. In order to bring this situation about, it becomes necessary for appellant to distort or repudiate the testimony of its own and other witnesses in the case. If we are mistaken in the last assertion, it is because of our inability to understand the statements of appellant in its brief. They appear inconsistent to us and contrary to the evidence, and we

now ask the court to note some of the peculiarities of the argument.

On page 23 of appellant's brief, appellant refers to the testimony of the Virginian's bridge officer, McLeod, in connection with the time elapsing between the first whistle and the collision. This statement is as follows:

> "That about a minute passed between the Strathalbyn's first and second whistles and about two minutes elapsed between the second whistle and the collision."

This makes three minutes between the first whistle from the Strathalbyn heard by McLeod which he interpreted to be for the Virginian. On page 23 of appellant's brief, reference is made to the testimony of Pilot Duffy, where it is said, that between the Strathalbyn's first whistle to the Virginian and the Strathalbyn's second whistle a minute elapsed, and that from one and one-half to two minutes elapsed between the second whistle and the danger signal, and from one-half to one minute elapsed from the danger signal to the collision. The result of this testimony of Duffy and McLeod is that *three* or *four* minutes elapsed between the first whistle they heard from the Strathalbyn to the Virginian and the collision. Green, the master of the Virginian, says he was on the bridge two minutes before the danger whistles, and that he came from his room when he heard the telegraph to stop. The conclu-

sion to be drawn from Green's testimony is that three minutes or more elapsed between the Strathalbyn's whistling to the Virginian and the collision. Observe what appears to us an inconsistency and refutation by the appellant of the testimony of its own witnesses. See page 31 of appellant's brief:

> "it becomes apparent that it could not have taken these vessels over two minutes to come together after the 'Strathalbyn's' first whistle was blown."

Bearing in mind that Duffy, McLeod and Green make the time between the first whistle to the Virginian and the collision three or four minutes, and bearing in mind that appellant has concluded the vessels came together in less than two minutes after the first whistle to the Virginian, as just above stated, appellant further confuses us by the following, occurring on page 25 of its brief:

> "The collision occurred from 3 to 3½ minutes after the 'Strathalbyn' blew her first whistle to the 'Virginian.' "

If we are not mistaken, within six pages of counsel's brief, he twice contradicts his own witnesses. But this is not all, for, under the topic "The Virginian was not guilty of any contributing fault," on p. 105 of brief, appellant says:

> "If, as we believe is clearly demonstrated, this time" (between Strathalbyn's first whistle to Virginian and collision) "was only two min-

> utes, then the Virginian had been reversing two-thirds of this time."

The testimony of the Virginian's witnesses concerning distances is hopelessly irreconcilable with every fixed fact in the case, unless eyewitness testimony is again to be disregarded. Please note that, on page 23, appellant quotes Duffy as saying the Flyer was from 300 to 400 feet from the Virginian when he heard a whistle ahead which was answered by the Flyer, and that, about a minute thereafter, he heard the Strathalbyn whistling to the Virginian. Note, on page 22 of appellant's brief, that it is said Capt. Green, master of the Virginian, testified that when he got on the bridge the Flyer was about a thousand feet ahead of the Virginian, and this was immediately after the Strathalbyn's first whistle to the Virginian. Note, on page 28 of appellant's brief, that the net result of appellant's effort to reconcile the testimony of the Virginian's witnesses as to the distance the Flyer was ahead of the Virginian when the Strathalbyn first blew is the conclusion that the Flyer was ahead of the Virginian from 885 to 1239 feet. Note that after these laborious calculations, on page 29 of appellant's brief it throws them all to the wind and says:

> "It is our opinion that these vessels were farther apart than 1,239 feet at the time this first whistle was given."

Note that this remark is the ultimate conclusion of

appellant, after devoting pages 25 to 29 to a discussion of the testimony of the Virginian's witnesses on the point, and is a second repudiation by the appellant of the testimony of the Virginian's witnesses, the first repudiation being in connection with the time between the whistles and the second being in connection with the distance between the vessels at the time of the whistles.

We are not surprised that appellant finds it difficult, and, in fact, impossible, from the premise assumed, to do otherwise than repudiate its own witnesses. The testimony of Pilot Duffy that the Virginian was but 300 feet ahead of the Flyer when the Flyer's whistles were exchanged with the Strathalbyn places the Virginian but 1116 feet beyond Pully Point at this time, if the Virginian and Flyer passed each other abreast of Pully Point, for, at the speed given, the Flyer was making 354 feet a minute greater distance than the Virginian. The testimony shows that the collision took place in the neighborhood of a mile or more south of Pully Point.

On page 1166 of the Apostles on direct examination Duffy was asked and answered as follows:

> "Q. About where did the collision occur, Captain?
>
> A. It must have been a mile or a mile and a-half—between a mile and a-half and two miles southward of Pully Point."

If this statement is correct it entirely destroys Duffy's estimate of the distance the Flyer was ahead of the Virginian when the above mentioned whistles were blown, and likewise shows that the time occupied by the Virginian in going from Pully Point to the place of the collision (asserted by appellant to be 6½ minutes,) is too short, for at the Virginian's rate of speed of 1116 feet a minute she would have taken more than eight minutes and nearly eleven minutes to reach a point "one and a-half to two miles southward of Pully Point."

In cross-appellant's brief, we pointed out the difficulty of arriving at any understanding of the situation from Duffy's testimony, and the above illustrates again his entire unreliability, and appellant itself tacitly admits this by laying no stress whatever on Duffy's testimony in trying to fix the position of the vessels at the time of the collision.

Please note the remark above referred to, on page 29 of appellant's brief, which was as follows:

> "It is our opinion that these vessels were farther apart than 1,239 feet at the time this first whistle was given."

and compare that remark with the remark of appellant made on page 26 of its brief, which is as follows:

> "It is, therefore, fairly accurately determined that, at the time the 'Strathalbyn' blew her first passing whistle to the 'Virginian,' the

> 'Flyer' was from 885 to 1239 feet ahead of the 'Virginian,' and that this was the approximate distance between the 'Strathalbyn' and the 'Virginian.' "

But the suggestion is made in appellant's brief that the extreme distance suggested by him of 1239 feet is improbable, for, quoting from page 28 of appellant's prief:

> "If they" (the Strathalbyn and Virginian) had not been any greater distance apart they would have come together in approximately one minute after this first whistle was blown. It does not seem possible that the 'Strathalbyn' blew two and possibly three signals and gave the danger signal, all within a period of one minute."

If the engine room log of the Strathalbyn is worth anything as evidence (and we can conceive of no reason why it should not be taken as absolutely the best evidence on the question of time), then there were four minutes elapsing between the signal to stop given to the engines of the Strathalbyn and the collision.

Above we have indicated that the Virginian's witnesses show the Flyer to be but one minute (300 feet) ahead when the Strathalbyn first blew and the Flyer answered, and, again, a thousand feet (when Capt. Green reached the bridge) ahead of the Virginian, yet, on page 30 of appellant's brief, appellant says:

> "In other words, that at the time the 'Strathalbyn' blew her first whistle to the 'Virginian,' the 'Flyer' was from 4 to 4½ minutes ahead of the 'Virginian,' or from 1,400 to 1,600 feet."

On the same page, a little farther down, appellant says that the time was "at least two minutes" from the time the Strathalbyn whistled to the Flyer until the Strathalbyn was abeam of the Flyer. Under this calculation, in the two minutes, multiplied by the Strathalbyn's and Flyer's combined speed, the Strathalbyn would be 4,160 feet ahead of the Flyer, which, added to the 1,600 feet that the Flyer was ahead of the Virginian, would place the Strathalbyn 5,760 feet away from the Virginian, or about a mile from the Virginian when the Virginian heard the Strathalbyn first blow to the Flyer. This distance is approximately nearer the truth as shown by the testimony of the Strathalbyn's witnesses and of Capt. Burns of the Flyer. Burns says that when this whistle was given, the Virginian was a quarter of a mile or more astern of the Flyer. We think the distance is yet too short, for the point of the collision is pretty well agreed upon as being between a third and a half of the distance from Pully Point towards Robinson Point, and it would take the Virginian, at full speed, at least 6½ to 9 minutes to run this distance. When the Strathalbyn first whistled to the Flyer, the distance was considerably greater between the Flyer and the Virginian than suggested by appellant, and the

time run by the Virginian beyond Pully Point was considerably more than 4½ minutes when the Strathalbyn blew to the Flyer.

As a further reply to the speculations of appellant as to the distances and positions of the steamers and the time the whistles were blown, we wish to refer to cross-appellant's opening brief, from page 93 to 96, where we have honestly tried to give due consideration to all the testimony and have understated the distance rather than overdrawn it, and we submit with confidence that this court will reach substantially the same conclusion on these points that we have.

Referring to claim of negligent navigation on the part of the Strathalbyn. Appellant has placed the Strathalbyn abeam of the Flyer when the Strathalbyn first commenced to whistle to the Virginian all through the argument on this point, when, as a fact, the Strathalbyn was nearer abeam of the Flyer on the second whistle to the Virginian than on her first. The Strathalbyn was just off the Flyer's quarter on her second whistle to the Virginian. As the Flyer and Virginian were substantially 3000 feet apart at this time, then the Strathalbyn and Virginian were very little closer. Can it be negligent for a navigator to blow a passing whistle to an oncoming vessel, when the *approaching* vessel is heading for the one giving the whistle and

the distance between them is practically half a mile? Surely not. Rule III specifies passing whistles shall be given when vessels are within one-half mile of each other (App.'s brief, 127). It can never be negligent to indicate a desire to pass as long as there is sufficient room for both vessels to pass by promptly co-operating in their endeavor. Rule I of Art. 18 of the Inland Rules requires *each* vessel, of two meeting end on, to pass on the port side of the other; and Art. 18 of the International Rules, which are applicable to all vessels navigating waters connecting with the ocean, provides that "each vessel shall alter her course to starboard so that each may pass on the port side of the other." This demands co-operation. Each navigator has a right to expect the other to do the usual and required thing, until the vessels get close enough together to indicate an abandonment of an intention on the part of the approaching vessel to do the usual and proper thing. So long as the vessels are far enough apart for the approaching vessel to execute the proper and usual maneuver and pass the vessel she is approaching in safety, there cannot be said to be a condition of danger which prohibits the use of the passing signal, and requires the use of a danger signal. The cases cited in the opening brief so interpret the rule, and distances given in that brief seemed to be sufficient to the pilot of the Strathalbyn to justify the three passing whistles, and we feel confident the court will agree, for, had

the Virginian then co-operated, the collision never would have occurred. Then (on the third whistle) the Strathalbyn was merely drifting, without steerage way, and the whole distance of a quarter of a mile was the Virginian's to maneuver in, and, when this maneuver was not made, the danger was blown.

What more could be expected of an ordinary mortal than to tell and tell and tell the Virginian to starboard by signaling and signaling and signaling, when such a maneuver meant perfect safety? Was it wrong for the Strathalbyn, which had lost its steerage way, to call for this co-operation until it appeared so doing would not avail? This is a question the court has to decide, and the opinion of the pilot may be of little consequence, but we submit the Strathalbyn's navigation has had the approval of very good courts, as will appear from the cases referred to.

We have asked ourselves time and again: "Would sounding the danger from the Strathalbyn when the third was blown have been a more effective way to avoid the collision than the whistling, whistling and whistling to go to starboard?" We have always had to answer it: "No."

If the Virginian was capable of forming any correct conclusion from steamboat whistles at the time these were given, she could only have known that

someone was off ahead of her who required her to go to port, for that someone never would have kept up such a whistling if he did not desire co-operation. If, knowing that someone desired such co-operation, and the Virginian would not render it, it does not seem probable she would have co-operated in the way demanded by the danger signal. As but one simple maneuver was required by the Virginian to change her course to keep her away from the Strathalbyn, prudence dictated the continued giving of the whistle which demanded this maneuver until it became apparent it was useless.

The Virginian takes the position that the Strathalbyn had the sole duty of avoiding the collision because "The Virginian's failure or refusal to answer the whistles could indicate only one thing to a competent navigator; that is, that the Virginian could not see the Strathalbyn or any of her lights" (brief, 45).

This phrase, in the exact language above quoted or in words of exact import, is repeated and repeated time and time again by appellant as though it hoped by so doing to force the pen that writes the decision in this case to mimic the phrase. From page 126 to 136, with much single-spaced print, appellant labors to show that the Virginian was prohibited by the rules and regulations from expressing her doubt of the Strathalbyn's position, course and intention by blowing the danger signal.

Not a single case is cited in these 10 pages in which any court has interpreted the rules, under anything like the circumstances prevailing in this case, in accordance with appellant's contention.

Rule III requires the danger signal to be *immediately* given when, "*from any cause*," the course or intention of a vessel is not understood. Strike out the words "from any cause" and insert words into the rule which limit the cases where the signal is to be used to causes which arise only when the vessels are in sight of each other, and then the court will have legislated as appellant desires.

In the interpretation of all laws, the first rule is to understand the purpose of the legislation and the intention of the legislators.

The navigation rules are prescribed to secure uniformity of practice for the sole purpose of preventing collisions. One of the most fertile sources of collision was uncertainty of the course and intention of an approaching vessel. One of the best ways of avoiding a collision is to stop vessels before they get to a point of contact. Hence the general rule which covers all situations arising "from any cause" set first in the order of rules, viz.,—blow the danger signal when, "from any cause," you don't "understand the course and intention" of the other vessel. This is the cardinal and first rule of safety; and the situation which has arisen in this

case shows the evils that would come from an interpretation of the law so narrow as to change the plain, simple command of the regulation.

After navigators are given this general rule of safety to protect under all circumstances, legislation begins with respect to the details of navigation for the same broad purpose of preventing collisions. The rule to pass to the right; to pass to the left; the overtaking rule; the crossing and approaching rule are all to be used in clear weather, but in fog, etc., only the fog signal is to be used and none of the passing or overtaking or approaching rules are to be used until the vessels can see each other. Why this restriction? We all have heard of the many collisions occurring because the navigator of one vessel, in such weather, mistakenly *thought* he knew the location of the other vessel from the apparent direction of the sound. Safety being the sole purpose of the rules, the use of these passing signals was prohibited until the vessels were in sight of each other.

When the great purpose of the legislation is kept in view, together with a knowledge of the causes for many collisions, we see Congress and the Department intrusted with the safety of marine commerce, providing against every contingency. What possible good could be served by providing exceptions to the general rule to stop when in doubt? Why go from the simple to the complex for no good pur-

pose? When two vessels are stopped, of course, they cannot collide. Therefore, when one vessel is in doubt, she is given permission to require the other to stop, and to compel co-operation to avoid disaster.

From pages 95 to 98 and from pages 134 to 136, appellant quotes the proceedings before the Internation Marine Conference concerning the use of 3 whistles to indicate "I am going astern," and draws certain conclusions therefrom. It was there said by Captain Sampson, representing the United States (app. brief, 135-136), that this movement (going full astern) may be "the direction to avoid a collision or *it may be the direction to produce a collision.*" The Conference voted not to adopt section e, viz., "A steam vessel, when her engines are going full speed astern, shall sound on her whistle three short blasts." The discussion was concerning rules to prevent collisions in fog and thick weather, and it was apparently decided that changing the position *of but one* vessel might produce the collision, which it was the desire to prevent.

But how different the rule which requires both vessels to stop on the danger signal and back until their headway is checked. Capt. Malmberg, of Sweden, said (app's brief, 135): "The safest way in a fog is to lay the ship dead still." It will surely be doubly safe if both ships lay still until they know each other's position and intention. The stopping of both vessels, as required by the rule, insures the

avoidance of a collision, regardless of whether the vessels can see each other. The appellant's argument, however, condemns either the truthfulness of the Virginian's witnesses or their good seamanship, for these three whistles were sounded by the Virginian when her bridge officers say they could not see the Strathalbyn.

The argument against the adoption of the three-whistle rule except when vessels are in sight of one another only accentuates the necessity for a rule to prevent collisions when vessels are not in sight and the situation concerning one is such that there is doubt upon the part of the other as to her course and intention.

Another rule for the interpretation of statutes is, that when the legislature includes one subject, it is the intention to exclude others. Applying this rule to Art. 28 of the International Rules (26 Stat. at Large, p. 320): The introductory sentence to that section is as follows:

> "Sound signals for vessels in sight of one another—
>
> One short blast means: I am directing my course to starboard.
>
> Two short blasts means: I am directing my course to port.
>
> Three short blasts means: My engines are going full speed astern."

This is all the article contains, and is the substance

of Rule 1 and Rule 8 of Art. 18 and Art. 28, the Act of Congress relating to the navigation of vessels on the harbors and waters of the United States, 30 U. S. Stat. at L., p. 96. Rule 9 is an *express* statutory prohibition against the use of these passing signals except when the vessels are in sight of each other, instead of an implied prohibition such as is contained in the International rules. If Congress wanted the danger whistle to be used only when vessels are in sight of each other, then it would have been included in the enumeration of the whistles to be used when vessels are in sight of each other.

In addition to the above considerations, the district court, in its decision, has assigned sufficient reasons for reaching the conclusion that the danger whistle should have been blown by the Virginian "immediately" (in the language of the rule), when her pilot was in doubt.

"The Virginian was not in doubt as to the course and intention of the Strathalbyn," says appellant at page 136 of its brief.

In cross-appellant's opening brief, at p. 119, is the commencement of Duffy's testimony bearing on the last above assertion. Duffy was in control of the Virginian's navigation. On page 120, his testimony is quoted as follows:

"Q. Now, I suppose you were in some doubt as to what was ahead of you?

A. Yes.

Q. I suppose you were in doubt as to the direction that vessel ahead of you was going in, were you not?

A. Yes, sir.

Q. You were in doubt as to the course it was taking, too?

A. Yes, sir.

Q. And you were in doubt as to the speed she was going?

A. Yes, sir.

Q. You did not know what they intended to do on board the Strathalbyn at the time they whistled to you the first time?

A. No, sir.

Q. Who was in control of the navigation of the Virginian?

A. I was pilot.

Q. You had control?

A. Yes, sir."

Is the statement that the Virginian was not in doubt based on the evidence?

On page 140 of appellant's brief, it is said:

"It was her" (Strathalbyn's) "positive duty to have indicated this danger to the *Virginian, who was in the dark, so to speak, as to the Strathalbyn's position.*"

Is not this inconsistent with the position that the Virginian knew the course and intention of the Strathalbyn?

And on page 146 of its brief, appellant says:

"The Virginian had no means of knowing the Strathalbyn was not performing her duty,"

viz., to port her helm (appellant's brief, p. 68). Then how can it be consistently asserted the pilot of the Virginian was not in doubt concerning the Strathalbyn's course?

As soon as one navigator is "in doubt," from "any cause," of the course and intention of the approaching steamer, the rule says: "Immediately" sound your danger signal. Yet appellant, on page 138, says: "Fault cannot be predicated upon failure of one vessel to sound an alarm when the developing danger is not apparent." What is meant by "apparent" is not quite clear, for, if one vessel knows another is approaching within whistling distance, but does not know the position, course or intention of that approaching vessel, it must then become sufficiently apparent there is danger of collision to raise a doubt as to the wisdom of proceeding without possessing knowledge of the position, course and intention of such vessel. Then, the rule says: Blow the danger, stop both vessels, acquaint yourself with the location, course and intention of the approaching vessel and then proceed. The rule says: "Be sure you are right, then go ahead." Had the Virginian blown the danger, performed this simple act of caution, then the Strathalbyn's pilot would not have been navigating under the impression his

lights were visible if they were not (as suggested by appellant's brief, at page 131).

On page 98 of its brief, appellant begins an attempt to show the Virginian's engine room log time is harmonious with the testimony of her bridge officers. To do this appellant intimates that her chief engineer made a mistake in entering in the log book the time of the collision, or that the time of collision so entered does not show the correct time. Not satisfied with drawing conclusions concerning the position of the various vessels and the time elapsing between the signals and the collision contrary to the positive testimony of the eyewitnesses from the Flyer and the Virginian's bridge officers, a resort is now had to show that the Virginian's engine log record is not reliable. On page 107 of the brief, appellant speaks of the time the stop signal was given, figuring it from the bridge officer's estimate of the time elapsing after passing Pully Point. It is said Green heard the telegraph to stop, "which would be at 7.56." The engine room log gives it at 7.57. On page 99, appellant italicizes the statement that Crerar and Beecher (captain and pilot of the Strathalbyn respectively) *"both testify that they saw the back water from the Virginian's propeller coming FORWARD under the Virginian's starboard quarter at the time the Virginian blew her three whistles."*

Crerar's testimony on the question of the water coming *forward* is found at Apostles, p. 242:

"Q. Did you observe whether or not the Virginian was backing at the time you came into collision?

A. Just before she struck us, Captain Beecher directed my attention to the wash of her water coming up.

Q. Where did it appear to be?

A. Around her stern.

Q. How far forward?

A. *It did not get forward at all*, but was just beginning to come up. Captain Beecher remarked: 'He is just going astern now.'

Q. How long was that before the collision?

A. Twenty or thirty seconds; about the same time he blew the danger signal."

Does the above evidence justify the Virginian's italicized statement above quoted?

Appellant says, on page 99 of its brief:

"The chief engineer took this memorandum log book from the engine room and made up the engineer's log, as follows:

Stop 7:57; full astern 7:58; stop 7:59; ahead slow 8:09.

In collision with the S. S. Strathalbyn at 7:58 p. m.

This latter entry, as the time of the collision with the Strathalbyn, was, therefore, *not made*

from any original record kept prior to or at the time of the collision." (The italicized portion is italicized by appellant).

And, on page 104, in italics, appellant says:

"*When it is remembered that no entry of the time of the collision was made in the memorandum engine room log.*"

Henry Trippense, the chief engineer of the Virginian, testifies (see 913 of Apostles):

"Q. Your log book shows *you came into collision* at 7:58 and that you went full speed astern at 7:58?

A. Yes, sir.

Q. That was the entry you made from the information you received at the time *from the book, from that small book?* (Speaking of engine room scrap log).

A. Yes, sir.

Q. And at that time you did not know there was anything wrong with this entry?

A. *I entered that from the small book when it came up out of the engine room.*"

Again, is appellant's statement founded on the evidence?

We agree with appellant's statement on p. 101 that the engine room log entries are made according to the nearest minute. There is not a word of testimony from the Virginian's engineers that the collision occurred either before or after 7:58. It probab-

ly occurred so close to 7:58 that there was no object in recording the seconds. All marine men know that the time of collision is an extremely important entry, and we surmise no engineer is going to inaccurately state it in his record. Without some testimony, we hardly think it fair to extend the time between the engine room signals to the extreme limit of possibilities in favor of the Virginian, especially in the face of the testimony of Trippense on the subject, as appears in Apostles, at page 909:

"Q. According to your best judgment, about what time had elapsed from the time the engines were reversed until this collision?

A. Well, that is pretty hard to say; I think it must have been—well, I could not make any estimate, because you know a minute is short when you are not looking for it, and it is long when you are looking for it, and I could not make any estimate except I go by the record in the book."

On page 862 of Apostles Green says it was from 30 seconds to a minute between the telegraph to stop and full speed astern.

The Strathalbyn frankly admits that the Virginian reversed after the Strathalbyn blew her danger and after the Virginian blew the three whistles which indicated her engines were going astern. What the engine log does show is that the stop, reverse and collision all could have, and probably did, transpire within a minute.

On page 106 appellant refers to the testimony of the Virginian's engineer, Trippense, in this way: "He could stop the Virginian in a little over a minute, and that his ship was stopped when the collision occurred." (at app. 909). Trippense says: "A. Well, I think the ship was stopped when the collision occurred." At Ap. 909 Trippense says: "A. occurs the following:

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> "The Virginian's officers testify positively that she was *reversing at least a minute* before the danger signal was given, and had been going full speed astern, at least two minutes before the collision."

Three minutes reversing, by this statement. A little over a minute to stop the Virginian, according to Trippense. Then the Virginian was for possibly two minutes actually making sternway away from the Strathalbyn, if each of the above statements relied upon by the appellant is true. Unfortunately the testimony of no one supports the conclusion that the Virginian was backing away at the time of the collision. She was coming rapidly into the Strathalbyn. Her backing for 20 to 30 seconds checked her headway, and when her stem tangled with and started to break, cut and bend the steel beams and plating of the Strathalbyn's stem and bow, then the Virginian's headway was further checked and she would not be making the cut into the Strathalbyn for much longer than 20 seconds, as testified to by Dickie. This is further corrobor-

ated by the engine room log, because the Virginian had backed away from the Strathalbyn and her engines were stopped at 7:59, or one minute after the recorded time of the collision.

We submit the evidence clearly shows the Virginian did not reverse until after the Strathalbyn blew the danger signal and until the Virginian blew the three signal blast which was used to indicate her engines were going astern. The signal to indicate the reverse engine movement in all probability was given when the movement commenced.

On page 68 of appellant's brief, the Strathalbyn is charged with what is termed the "most serious" fault in connection with the collision, viz.: the failure of the Strathalbyn to port and go to starboard on giving the passing whistles.

We expect this court to follow the rule for weighing evidence laid down by the Supreme Court of the United States in

> *The New York and Liverpool United States Mail Steamship Co. vs. Otis P. Rumball*, 21 How. 372; 16 Law. Ed. 144,

in which the Supreme Court says:

> "One remark is applicable to all the witnesses introduced by the respondents" (the steamship) "and that is, they had not the same means of knowing respecting the matter in dispute as the witnesses for the libellants" (the brig) "possessed, who had charge of the brig

and governed her course; *and in weighing the evidence, and determining its force and effect, that important consideration cannot be overlooked.* It must be admitted that the witnesses on the part of the libellant speak with actual knowledge, and unless they have wilfully stated what they know to be false, their statements must be correct. They were on the deck of the vessel, interested, so far as their personal safety was concerned, to observe everything that transpired as the steamer approached, and they cannot well be mistaken in respect to the matter under consideration."

The Virginian is charging the Strathalbyn with serious fault of not porting when the Strathalbyn was whistling for a port-to-port passage, and the burden is upon the Virginian to prove this fault.

As was said in the case of

The Diana, 18 Fed. 263:

"The Bolston has charged the Diana with fault and filed a libel for the damage she sustained. The Diana has alleged that the Bolston was wholly at fault, and has also libelled the vessel for the damages to the Diana. The burden of proof is therefore upon each party to prove the charges it makes and the cross allegations put the court under the necessity of determining the facts from the theories of both parties rather than to see if either one has sustained the burden of proof."

The testimony (Ap. 206, 207, 288, 289, 241, 327, 329, 330) of Capt. Beecher, Mr. Purdy, Capt. Crerar and Russell, who had active charge of the

navigation of the Strathalbyn, is that the Strathalbyn's helm was ported and her head was swung to starboard when the whistles were given, and unless each is deliberately testifying to what he knows to be false, their testimony is entitled to be believed. And, strange to say, the actual navigators, who were on the scene and observed all that was going on and whose duty it was to avoid the collision and whose every impulse was to turn the head of the Strathalbyn to starboard, are charged with not porting, and held to be deliberate falsifiers upon the expert testimony of ship surveyors who do not attempt to be more definite than to say that the vessels came into collision in a "nearly" head-on position. As appears from the reading of this expert testimony of these marine surveyors, they but speculated upon the probabilities from indefinite knowledge of the character of the damage to the Strathalbyn. It is almost inconceivable that any court could so magnify the credit to be given to this class of testimony that it could hold it to overcome and outweigh the testimony of the men who participated in the navigation of the Strathalbyn, who were in duty bound to save that vessel, and who had the responsibility of the lives of the crew on their shoulders, especially when the testimony of these bridge officers that they did port is corroborated by the testimony of independent expert witnesses who had the details of damage to the Strathalbyn's bow before them and drew their conclusions

therefrom, which conclusions are sufficiently different from those drawn by the surveyors employed by the Virginian to testify in this case, to corroborate all that the bridge officers on the Strathalbyn had testified to. Can there be any doubt that Pilot Beecher knew his ship was heading inside of Pully Point after he first ported, and that she was heading for the gravel pit the next time? Who would be in a better position to observe this fact than Beecher? And who would be in a better position to corroborate him than Crerar and Purdy, the man at the wheel?

The court will have to find some positive, definite and conclusive evidence that these men are falsifying in their statements before it will be justified in holding them to such an inconceivable fault as to refuse or fail to port when for five minutes, or such a matter, the approach of the Virginian appeared to demand that very maneuver for the safety of the Strathalbyn, and when the passing whistles given by the Strathalbyn called for the maneuver, and when there is no reason of which we can conceive which would justify any other course of navigation. The Virginian must overcome the probabilities, which are all in favor of the Strathalbyn swinging her head to starboard. Our contention is, that there is no testimony of sufficient weight to, or of such character as does, justify discrediting the Strathal-

byn's navigating officers and making them out perjurers, pure and simple. The Strathalbyn ported her helm as testified to by Beecher, and the vessels came into collision upon the angle as testified to by the other eyewitnesses in the case, and we feel confident this court, applying the rules for weighing conflicting evidence of the character mentioned, will vindicate these witnesses and maintain them in their testimony concerning the Strathalbyn's navigation in this respect.

Pages 74 to 85 of appellant's brief are devoted to upbraiding the Strathalbyn for not carrying a range light. There isn't any question but what she was an ocean-going steamer, and there isn't any question but what the rule which permits ocean-going vessels to navigate our waters without a range light, has stood as the rule during all the time since and prior to the International Marine Conference of 1899, from which appellant extensively quotes, and since the case of "The Conoho," referred to on page 80 of appellant's brief. That ocean steamships ply our waters without range lights is such common kowledge that it does not need proof to anyone who is familiar with the ordinary course of such commerce, and we do not take seriously the charge that the Strathalbyn was in fault for doing that which the rules expressly permit her to do, viz.: to navigate the inland waters

connecting with the sea without carrying a range light.

We are charged with negligence for not having a range light because the Virginian says she could have told our course had we had one, even though she says she could not see the side lights, but the plea is made that the Virginian didn't see the Strathalbyn's masthead light, possibly because it became confused with a shore light, although some witness for the Virginian expressly testifies that it was not the character of a light that he could confuse with a shore light. If it were so easy and simple to confuse the big masthead light of the Strathalbyn with a shore light, we don't doubt but what the range light could just as easily have been confused. When a vessel has not a vigilant lookout aboard, it makes no difference the kind of lights carried by an approaching vessel, and if a vessel has a vigilant lookout aboard and the officers refuse to comply with passing whistles, then it makes no difference what kind of lights the approaching vessel may carry. When it becomes wise and necessary, in the ordinary practice of steamboating for ocean-going vessels, to carry range lights, then we anticipate that Congress and the department having control of such navigation will prescribe the use of such lights. We hardly expect this court, any more than the lower court, will legislate that such lights must be used, in the face of an express permission

in the statute not to use a range light upon ocean-going steamers.

On page 38 of appellant's brief, we find the commencement of the discussion of the negligent navigation of the Strathalbyn prior to the collision, and this discussion contiues, with the citation of many cases, through to page 68. The Strathalbyn has cited, and relies upon, the case of *The New York*, 175 U. S. 187, as a complete justification of her navigation, and the Virginian relies upon this case to condemn the Strathalbyn's navigation. If the Strathalbyn, in due time, did that for which the Conemaugh was condemned by the court for not doing, then we take it the Strathalbyn has navigated in accordance with safe navigation as prescribed in that case. On page 51 of appellant's brief, it appears that the Conemaugh had three times signaled her wish to pass starboard-to-starboard. This was a departure from the established rule. The New York failed to reply to the Conemaugh's signals, and the Conemaugh construed her failure to reply as an acquiescence in her own signals. The Conemaugh was condemned because she did not stop until the mystery of the New York's silence was explained. Let us compare the Strathalbyn's navigation. When the Strathalbyn's second whistle was blown to the Virginian, she stopped. Her pilot had evidently learned, as said on page 51 of appellant's brief, quoting page 207 of the New York opinion:

> "The lesson that steam vessels must stop their engines in the presence of danger or even of anticipated danger."

Before leaving the New York case, it is interesting to note that the Conemaugh had construed the New York's failure to answer as an acquiescence in the Conemaugh's signals. The master of the Conemaugh did not construe the New York's neglect to answer the three signals as a message from the New York that the Conemaugh was invisible or her lights could not be seen. The construction put by the Conemaugh's master upon the New York's silence does not tend to confirm appellant's statement that the Virginian's silence could alone mean: "I cannot see your lights."

The Duluth Steamship Co. vs. Pittsburg Steamship Co. is cited as a case to condemn the Strathalbyn. The Bessemer was condemned because she did not stop or blow an alarm signal when she saw the Sylvania navigating contrary to the agreement as it was understood by the Bessemer. The Strathalbyn cannot be condemned as was the Bessemer, because she did stop some four minutes before the collision, and did blow an alarm signal, and the Strathalbyn did stop when the Virginian's red light commenced to get dim. We contend that we did not speculate as to whether or not we should adopt the safest course, but that we did adopt that course, and, having adopted the safest course,

by stopping, as prescribed in the two above referred to cases, and told the Virginian to go to starboard, through our whistles, we cannot possibly be condemned for fault in the navigation of the vessel.

On page 59 of appellant's brief is another quotation from the New York case above referred to. It is said it was the duty of the Conemaugh to have stopped her engines after the second signal, and, if necessary to bring the Conemaugh to a complete standstill, to have reversed them. This is exactly what the Strathalbyn did do, and, considering the speed of the Strathalbyn and the Virginian as they were approaching, she did this in sufficient time to have avoided the collision had the Virginian co-operated, as she was bound to do by all the rules and practice of navigation.

In order to condemn the Strathalbyn for negligent navigation under the rule announced in the cases cited in appellant's brief, this court must hold that all the officers of the Strathalbyn testified falsely concerning her engine movements, and that the written engine room log of the Strathalbyn is a deliberately concocted piece of evidence. There must be something in this case more than a charge of negligence to discredit the testimony of as reputable navigators as stood upon the bridge of the Strathalbyn and to discredit the testimony of Sandilands, her faithful old engineer. Everything in the circumstances, whether duty or conditions,

corroborates the testimony of these men and speaks for its verity, for there is no evidence of a certain, positive or definite nature which contradicts it, and there is nothing in the circumstances surrounding the collision to refute it.

In our opening brief, we have referred to the testimony of the eyewitnesses who saw the Strathalbyn's lights prior to, substantially at the time of, and after the collision, and we can only add, in this connection, that we hope the court will read the Apostles and the testimony of these witnesses without prejudice but in an honest endeavor to reconcile the testimony of all the disinterested witnesses concerning the lights, and we feel confident that this court will apply the ordinary rules of evidence and give due weight to the testimony of eyewitnesses and will check the bold attempt of the Virginian's officers to justify their non-observance of the lights by testifying they were obscured and dim, so that they did not, and could not, see them as the Strathalbyn was approaching the Virginian. We feel that the court cannot overlook the fact that the Flyer, meeting the Strathalbyn, exchanged the ordinary passing signals; that men upon the Flyer made her out by all her lights; and that nothing unusual or extraordinary was thought of the Strathalbyn or her lights; that every remark or inference from the passengers on board the Flyer was that they couldn't understand why

the Virginian was navigating either as though her master were drunk or from some other inexplicable cause. The testimony of the Strathalbyn's officers is corroborated by many eyewitnesses, in respect to her lights, navigation and whistles. The testimony of the Virginian's officers is contradicted by the engine room record, and appellant discredits its own engine room log and its bridge officers' testimony. All the witnesses from the Flyer contradict the Virginian's officers on the point that the Strathalbyn's lights were flaring up and going down; and we ask the court, in weighing the testimony of the Virginian's officers, to give due regard to these facts, and to give their testimony only such weight as these facts warrant.

With respect to the decree: We are not sure that the Strathalbyn is called upon to answer the assigned error in connection with it, but it appears that if there is any error, it is entirely harmless and can work no injury to the Virginian. If she pays the debts she owes in the manner provided by the decree, she suffers no loss, and if she does not pay the debts she owes in the manner provided by the decree, an execution against her will not damage her in any way. The damages are divided. The Virginian simply has to pay to the cargo owners what she owes them, according to the decree, before she can recoup, under the decree, from the Strathalbyn. It seems strange that the

Virginian can find error in a decree which only compels her to pay a just demand.

The Virginian complains about the allowance of interest and costs. Interest and costs are allowed to both parties as a part of their damage. In the discretion of the lower court, this seemed equitable and fair. The lower court held that the fault of the Virginian was substantially as much a factor in bringing about the collision as the fault of the Strathalbyn was substantially a factor in so doing. The fact that the lower court first considered the faults of the Strathalbyn in its opinion is no reason for claiming that those faults are the primary faults of the collision. If the faults of the two vessels concurred in bringing about the collision, then the damages should be divided. The courts have remarked upon the ease with which the primary or principal fault may be attached to one vessel because of the order in which the court considers the case, and so in this case it appears that great stress is laid by appellant on the primary fault of the Strathalbyn, she having been first referred to in the lower court's opinion. We cannot see, and neither could the lower court, that there is any more iniquity in failing to have proper side lights, and thereby violating a statutory rule, than there is iniquity in failing to blow the danger signal when in doubt or in failing to reverse in time to avoid a collision, or in failing to

go to starboard when so directed to do, all of which are statutory rules, and any one of which, if observed, would have prevented the collision.

As bearing on this point, we will quote from the case of

Chamberlain vs. Ward, 21 How. 548; 16 Law. Ed. 221, as follows, which case was decided after the New York case above referred to:

> "Failure to comply with the regulation in case a collision ensues is declared to be a fault, and the offending party is made responsible for all loss or damage resulting from the neglect, but it is not declared by that section, or by any other rule of admiralty law in the jurisprudence of the United States, that the neglect to show signal lights, on the part of one vessel, discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision. Absence of signal lights, in cases falling within the Act of Congress, renders the vessel liable to the extent already mentioned; but it does not confer any right upon the other vessel to disregard or violate the rules of navigation, or to neglect any reasonable or practicable precaution to avoid a collision, which the circumstances afford the means and opportunity to adopt. * * * All we mean to decide is that the neglect of the propellor to show signal lights did not vary the obligations of the Atlantic to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision,

as the circumstances in which she was placed gave her the opportunity to employ."

United States vs. Erie Railroad Co., 122 Fed. 50 (page 56):

"This court has repeatedly held the fault, and even the gross fault, of one vessel does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require. *The Maria Martin*, 12 Wall. 31, 20 L. Ed. 251; *The America*, 92 U. S. 432, 23 L. Ed. 724; *The Lucille*, 15 Wall. 676, 21 L. Ed. 247; *The Sunnyside*, 91 U. S. 208, 23 L. Ed. 302."

We respectfully assert that if the decree of the lower court is affirmed, dividing the damages, then there is no room to contend in this case that interest and costs should not be allowed each party and also be divided, and we again ask the court to hold the Virginian solely at fault for the errors mentioned.

Respectfully submitted,

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